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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-926

JAMES HORELICK,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

LEWIS R. FRIEDMAN
ROBERT A. GOLDSCHLAG
Assistant District Attorneys
Of Counsel

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Preliminary Statement

Petitioner, James Horelick, seeks a writ of certiorari to the Court of Appeals of the State of New York, to review an order of that Court, entered June 7, 1972, affirming an order of the New York Supreme Court, Appellate Term, First Department, entered November 5, 1971, affirming a judgment of the Criminal Court of the City of New York, New York County, rendered June 18, 1970, convicting Horelick of two counts of CRIMINAL TRESPASS IN THE SEC-

ond Degree (New York Penal Law §140.10) and one count of Resisting Arrest (New York Penal Law §205.30) and sentencing him to pay fines aggregating $500 or to serve sixty days' imprisonment in lieu thereof.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Statement of the Case

Because of a labor dispute between the New York City Board of Education and the United Federation of Teachers, the principal of Washington Irving High School, in New York County, some time prior to October 17, 1968, ordered the school "closed," thus leaving the custodian and his staff in charge of the building. On October 17, 1968, the chairman of the mathematics department at Washington Irving, Edward Williams, was appointed "teacher-in-charge" of the school, by the local District Superintendent of Schools. When he was unable to persuade the custodial staff, who doubted the authenticity of his appointment, to open the building to the teachers, Mr. Williams met with several of the non-striking teachers, including the defendant, James Horelick, and discussed the prospects of surreptitiously entering the building and then compelling the admittance of the non-striking teachers.

After the discussion, James Horelick entered the building through a basement window. He was discovered, however, by a member of the custodial staff, with whom he

struggled while attempting to open the doors of the school and admit the other teachers. A police officer arrived and, when he arrested Horelick for trespassing, the defendant attempted to escape custody, and tried to kick the policeman. Later, when he was led out of the school, Mr. Horelick resumed struggling and attempted to prevent the police from placing him into a police car. A codefendant, Sandra Adickes, who was among a crowd of about sixty people that had surrounded the police car, then attempted to pull Mr. Horelick from the vehicle.

Both defendants were arrested. Mr. Horelick was charged with criminal trespass in the second degree (New York Penal Law §140.10) and resisting arrest (New York Penal Law §205.30). Ms. Adickes was charged with resisting arrest (*Ibid.*) and harassment (New York Penal Law §240.25).

In a separate incident, on October 20, 1968, at about 12:01 a.m., Horelick was again arrested after he refused the requests of the custodian and police officers to leave Washington Irving High School. As a result he was again charged with criminal trespass in the second degree.

On September 25, 1969, the defendants filed a summons and complaint in the District Court for the Southern District of New York, requesting an injunction to prevent the pending prosecution. The request was denied by Judge Ryan on December 9, 1969. The United States Court of Appeals affirmed the denial [*Adickes* v. *Leary*, 436 F.2d 540 (2d Cir. 1971)] and this Court denied a petition for certiorari. *Adickes* v. *Leary*, 404 U.S. 862 (1971).

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On the morning of September 30, 1969, the day originally set for trial, while the proceedings for the federal injunction were still pending, the defendants removed the case to the Federal District Court. The People moved for remand to the State courts and their motion was granted, effective on October 19, 1969. Both the United States Court of Appeals and this Court denied a stay of the trial on the criminal charges. *Horelick* v. *New York*, 396 U.S. 873 (1969). The Court of Appeals thereafter affirmed the order to remand [*Horelick* v. *New York*, 424 F.2d 697 (2d Cir. 1970)] and this Court denied certiorari. *Horelick* v. *New York*, 398 U.S. 939, *reh. denied*, 400 U.S. 883 (1970).

Horelick was eventually found guilty of both counts of criminal trespass and one count of resisting arrest and was acquitted of harassment. In announcing its verdict the trial court stated that it found that the high school was both legally and physically closed on October 17, 1968, that Horelick was aware of this, that the letter authorizing Williams to be "teacher-in-charge" did not authorize the opening of the school and that "in entering the school [Horelick] ran the risk and was not in a position to assert that his entry was under a claim of legal right." Petitioner was thereafter sentenced to pay fines aggregating $500 or to serve sixty days' imprisonment in lieu thereof.

In an order entered on November 5, 1971, the Supreme Court of the State of New York, Appellate Term, First Department, unanimously affirmed the judgment of conviction.

In the Court of Appeals, petitioner argued that he was privileged to enter the school and entered under a claim

of right, and that his conviction was contrary to existing procedures and amounted to an *ex post facto* law.

The New York State Court of Appeals affirmed Horelick's conviction in an opinion by Judge BREITEL, three judges dissenting. *People* v. *Horelick*, 30 N.Y.2d 453, 334 N.Y.S.2d 623, 285 N.E.2d 864 (1972). The conviction of co-defendant, Sandra Adickes, was reversed. *People* v. *Adickes*, 30 N.Y.2d 461, 334 N.Y.S.2d 629, 285 N.E.2d 868 (1972). Petitioner sought reargument in the Court of Appeals, elaborating upon his claim of an *ex post facto* interpretation of the trespass statute. On September 28, 1972, the Court of Appeals denied the motion. *People* v. *Horelick*, 31 N.Y.2d 709 (1972).

After petitioner's conviction he obtained a certificate of reasonable doubt from the State Courts. Execution of sentence was further stayed by Chief Judge FULD of the New York State Court of Appeals pending this Court's determination of the petition.

ARGUMENT

Petitioner's specious claims do not raise a substantial federal question.

The petitioner, James Horelick, seeks a writ of certiorari to review only that portion of the decision of the New York State Court of Appeals which affirmed a judgment convicting him of criminal trespass in the second degree for his forceable entry into the school on October 17, 1968. Relying upon *Bowie* v. *City of Columbia*, 378 U.S. 347 (1964), he argues that he was denied due process because the

decision of the Court of Appeals allegedly modified the interpretation of the criminal trespass statute under which petitioner was convicted to the extent that it worked an *ex post facto* change in the law and entrapped him into committing the crime. Specifically, he argues that prior to his conviction the trespass statute had not been interpreted as making the forcible entry upon property criminal, if the person so intruding was privileged to enter. Additionally he claims that he entered the school only because the Board of Education led him to believe that he was privileged to enter and that in any event he did not use force to enter the school. These claims are "so absolutely devoid of merit as to be frivolous" and do not warrant the granting of a writ of certiorari. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902); *accord, Zucht* v. *King*, 260 U.S. 174 (1922).

Judge BREITEL, writing for the Court, concluded that petitioner's guilt of criminal trespass did not depend upon whether "the school was properly closed or not" (petitioner's appendix, 4a), but rather whether Horelick had a privilege to use force to enter the building. This holding is the asserted basis for petitioner's claim of an *ex post facto* change in the law.

At the outset it should be noted that the trespass statute which petitioner was found to have violated, New York Penal Law Section 140.10, became effective September 1, 1967, only a year prior to Horelick's arrest and the New York State Court of Appeals' decision was one of the first opportunities the court had to interpret the statute. Moreover, as Judge BREITEL pointed out (petitioner's

appendix, pp. 1a-2a), the law of New York State has never permitted an individual to use force to gain access to property regardless of a claimed right to enter. *E.g.*, former New York Penal Law §2034; *People* v. *Baldwin*, 74 Misc. 384, 134 N.Y.S. 221 (Co. Ct. Erie Co. 1911). The statute under which petitioner was convicted merely continued that long-standing rule. Horelick should hardly be heard to say that he was unaware that the law precluded him from using force to enter a building from which he had been barred by both the custodian in charge and the police. This was the sort of conduct which would obviously be prohibited under any construction of the statute. *Dombrowski* v. *Pfister*, 380 U.S. 479, 491-2 (1965). And his claim that he did not use force at most raises a factual issue not warranting the granting of certiorari [*Berenzi* v. *Immigration Director*, 385 U.S. 630 (1967); *United States* v. *Johnston*, 268 U.S. 220 (1925); *Grayson* v. *Harris*, 267 U.S. 352 (1925)] and is contrary to the record which shows that he struggled with both the school custodian and the police after sneaking into the school through a window. Indeed, the Court of Appeals, noting the large number of persons at the scene and the tense situation at the time, concluded that petitioner's acts to secure and maintain his entrance into the building might have inevitably led to riot. Petitioner's appendix, p. 4a.

Moreover, petitioner's claim that he was convicted despite the fact that he entered the school with privilege and a claim of right is plainly wrong. Although the Court of Appeals felt there was no need to determine this issue, the trier of fact found that Horelick entered the school without privilege. This finding was affirmed by the Appellate Term, the highest New York court with jurisdiction to review facts. New York Criminal Procedure Law §§470.15, 470.35.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

LEWIS R. FRIEDMAN
ROBERT A. GOLDSCHLAG
Assistant District Attorneys
Of Counsel

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